IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

DUFFIELD ASSOCIATES, INC. a Delaware corporation,	)	
Plaintiff,	)	
v.	)	C.A. No. S10C-03-004 RFS
MERIDIAN ARCHITECTS & ENGINEERS, LLC, a Delaware Limited Liability Company, WIND-MILL ESTATES, LLC, a Delaware Limited Liability Company, DARIN LOCKWOOD, individually, and JOHN L. STANTON, individually,	)	
Defendants.	)	

MEMORANDUM OPINION

Defendant Lockwood's Motion to Dismiss Count III. Denied.
Defendant Stanton's Motion to Dismiss Count III. Denied.
Plaintiff's Motion to Dismiss Defendant Windmill's Counterclaim. Denied.

Submitted Date: June 16, 2010
Decided Date: July 12, 2010

John F. Thomas, Jr., Esquire, New Castle, Delaware, Attorney for Plaintiff.

John W. Paradee, Esquire, D. Benjamin Snyder, Esquire, Stephen E. Smith, Esquire, and Nicole M. Faries, Esquire, Prickett, Jones & Elliott, P.A., Attorneys for Defendant Meridian Architects & Engineers, LLC and Defendant Darin Lockwood.

John E. O'Brien, Esquire, Brown, Shiels & O'Brien, LLC, Attorney for Defendants Windmill Estates, LLC and Defendant John L. Stanton.

STOKES, J.

This is an action in debt and breach of contract filed by Plaintiff Duffield Associates, Inc. ("Plaintiff"). The Defendants are Meridian Architects & Engineers, LLC ("Meridian"); Windmill Estates, LLC ("Windmill"); Darin Lockwood ("Lockwood"); and John L. Stanton ("Stanton"). Meridian answered and filed a cross-claim against Windmill. Windmill answered and filed a cross-claim against Meridian and a counterclaim against Duffield.

Pending before me are the following motions:

1. Lockwood's Motion to Dismiss Lockwood as a Party Defendant (Count III, Fraud, Fraudulent Inducement, Misrepresentation, Conspiracy).
2. Stanton's Motion to Dismiss Stanton as a Party Defendant (Count III, Fraud, Fraudulent Inducement, Misrepresentation, Conspiracy).
3. Duffield's Motion to Dismiss Windmill's counterclaim against Duffield.

The following facts are alleged in the Complaint. Duffield is a corporate business engaged in engineering services and geotechnical consulting. Meridian is an engineering firm. Windmill is a limited liability corporation ("LLC") engaged in real estate development. Lockwood is a member of both Meridian and Windmill. Stanton is a member of Windmill.

In late 2006, Meridian solicited Duffield to perform environmental and geotechnical consulting engineering services in connection with a wastewater treatment plant system in a construction project. Windmill was undertaking the construction

project, which was known as Windmill Estates Subdivision in Little Creek Hundred, Sussex County ("the Project"). Duffield presented a proposal for design to Meridian on December 6, 2006. The Proposal contemplated the work to be performed on a time and material basis, according to an hourly rate schedule. The total estimated fee was $179,000.00. The Proposal included Duffield's General Contract Conditions, which set forth Duffield's terms of contract. Lockwood, acting on behalf of Meridian, agreed to the Proposal on December 7, 2006. Duffield thereafter began work on the Project.

On April 2, 2007, Duffield wrote to Lockwood and detailed numerous changes in Duffield's schedule which were beyond Duffield's control. The letter estimated that Duffield was approximately 30 days behind schedule as a result of the delays. However, Duffield believed that it could continue to work without increased cost or overall delay because of extra time that had been built into the schedule. However, Duffield experienced further delays and scheduling setbacks which Duffield was not able to absorb into its schedule. The delays included unforeseen site conditions, changes in planning by the owner, and delays in receiving information and responses from third parties.

On September 14, 2007, Duffield wrote to Meridian requesting a change order for $55,000.00 to accommodate the additional work on the Project. Duffield did not stop work on the project at this time.

As of October 31, 2007, Duffield had billed Meridian $125,686.52, and had been paid $69,597.23. In addition, Meridian had subcontracted an additional $20,151.20 of

hydrogeologic services from Duffield through an entity known as Laurel Oak, LLC. Duffield had completed these services but was unpaid. Between September 14, 2007, and November 28, 2007, the parties engaged in meetings and discussion regarding payments, job progress and the requested change order.

On November 28, 2007, Duffield sent Lockwood a letter stating that Duffield had stopped work because of unpaid invoices and Meridian's failure to agree to the change order. On January 2, 2008, Duffield sent Meridian a certified letter stating that if the invoices were not paid and the change order was not accepted by January 12, 2008, Duffield would pursue collections action.

On April 2, 2008, Lockwood, acting on behalf of both Meridian and Windmill, paid Duffield $55,000.00, and accepted a total contract price of $206, 751.20. A letter setting forth the terms was signed by both Lockwood and Stanton. As part of its terms, Windmill guaranteed Meridian's debt and stated that Duffield would be paid in full when settlement occurred on the Project. The letter also stated that if settlement did not occur in a timely fashion, then Duffield would be "paid in full or reasonable interest until settlement occurs." Having received partial payment, Duffield undertook to finish the work on the Project and timely complete its services under the contract.

On June 8, 2008, Meridian sold all of its assets to Artesian Consulting, a subsidiary of Artesian Resources Corporation, a publicly-traded company ("Artesian").

On March 17, 2009, Duffield completed its services for Meridian with the issuance

by DNREC of its final permit to construct the wastewater treatment facility on the Project. On March 25, 2009, Duffield sent Lockwood a letter stating that the unpaid balance under the agreement of April 2, 2008, was $82,153.17.

Meridian has made no payment to Duffield since the April 2, 2008 payment of $55,000.00. Duffield has billed Meridian for the full amount of $203,097.78, which includes all time and materials spent on the Project.

Count I of the Complaint alleges breach of contract against Meridian and Windmill for failure to pay the outstanding balance. The alleged damages are $172,315.47, plus prejudgment interest at the rate of 1 ½ percent per month in the amount of $38,903.51 through February 24, 2010 for a total of $211,218.98, plus continuing service charges and attorney's fees and cost incurred in debt collection. The Complaint alleges that Windmill agreed, in writing, to guarantee the payment of Duffield's contract with Meridian, and is jointly and severally liable to Duffield for all amounts due from Meridian.

Count II alleges, in the alternative, *quantum meruit, quantum valebant* and unjust enrichment against Meridian and Windmill. Duffield has provided goods and services to Meridian, and the reasonable expectation of compensation has not been fulfilled. Meridian has retained the value of the goods and services, and has thereby been unjustly enriched. Windmill, as the property owner, has received the benefits of the goods and services and has thereby been unjustly enriched. Duffield alleges that it is entitled to recover the reasonable value of the goods and services provided to Meridian and

Windmill. Duffield seeks an amount in excess of $172,315.47, plus pre- and post-judgment interest at the legal rate.

Count III alleges fraud, fraudulent inducement, misrepresentation and conspiracy against all Defendants. In November 2007 Duffield notified Lockwood and Meridian in writing that Duffield had stopped work as a result of the unpaid invoices and change order. In a letter dated April 2, 2008, partial payment was proffered to Duffield by Lockwood, Stanton, Meridian and Windmill. The letter promised that payment of interest and/or principal would be paid by either Meridian or Windmill. The letter states that it will "serve as a Bilateral Corporate Guarantee ("the Guarantee"). In reliance on the representation made by Lockwood and Stanton, Duffield resumed work on the Project on an accelerated basis. The work was completed. On June 8, 2009, all of Meridian's assets were sold to Artesian for cash. Duffield alleges that Lockwood received the cash purchase price.

Duffield alleges that at the time that Lockwood and Stanton made the written representations to Duffield, Lockwood was actively involved in negotiations with Artesian for the asset acquisition. Duffield further alleges that Lockwood and Stanton never intended to pay Duffield for any further work on the Project. Duffield alleges that Lockwood and Stanton each made knowingly false representations of future payment to induce Duffield to continue work on the Project, with *scienter*, intending that Duffield rely upon those promises of payment to Duffield's detriment. To Duffield's knowledge,

Lockwood made no provision for payment of Meridian's creditors, including Duffield.

Duffield alleges that it reasonably and justifiably relied on Lockwood's and Stanton's misrepresentations to Duffield's detriment by continuing to expend time and resources after the false promises of payment were made. Lockwood was an agent of both Meridian and Windmill at the time he made the misrepresentations to Duffield. Stanton was the agent of Windmill. Duffield alleges that Stanton and Lockwood, each having knowledge that Meridian would soon be sold, conspired together to wrongfully induce Duffield to provide further services to Meridian for Windmill's benefit. Stanton and Lockwood each undertook action in furtherance of the conspiracy.

In the alternative, Duffield alleges that Lockwood's and Stanton's reckless, wanton, negligent or innocent misrepresentations, and Duffield's reliance thereon, have damaged Duffield in excess of $211,218.98. Duffield also seeks punitive damages for Stanton and Lockwood's extreme and outrageous behavior.

Thus, Duffield seeks judgment against Lockwood, Stanton, Meridian and Windmill, individually, jointly and severally, for fraud, fraudulent inducement, conspiracy and/or misrepresentation in an amount exceeding $211,218.98, plus post-judgment interest at the legal rate, plus attorney's fees and costs incurred in collection and punitive damages.

Standard of review. A motion to dismiss for failure to state a claim upon which relief can be granted made pursuant to Super. Ct. Civ. R. 12(b)(6) will not be granted if

the plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint.[1] In considering a motion to dismiss, all well-pleaded allegations in the complaint must be accepted as true.[2] A complaint pleading fraud must allege "all of the essential factual background that would accompany the first paragraph of any newspaper story – that is, the who, what, when, where and how of the events at issue.[3]

Lockwood's motion to dismiss and Stanton's motion to dismiss. [4] As to fraud and fraudulent inducement, Lockwood and Stanton argue that they did not sign the Guarantee in their personal capacities but on behalf of Meridian and Windmill, respectively. For this reason, they argue that they cannot be held personally liable under the terms of the Guarantee. They argue that Meridian and Windmill are responsible for satisfying the terms of the Guarantee. They also argue that the Complaint does not allege any false representations of material fact by Lockwood or Stanton and therefore cannot survive a motion to dismiss. Finally, Stanton argues that the Complaint does not allege that he received any benefit from the sale of Meridian's assets.

---

[1] *Spence v. Funk*, 396 A.2d 967 (Del. 1978).

[2] *American Ins. Co. v. Material Transit, Inc.*, 446 A.2d 1011 (Del. Super. Ct. 1982).

[3] *In re Rockefeller Ctr. Props. Sec. Litig.* 311 F.3d 198 (3rd Cir. 2002).

[4] Lockwood and Stanton have filed motions to dismiss which are virtually identical except that Stanton argues that he did not benefit from the sale of Meridian's assets to Artesian. To avoid redundancy, the Court deals with the two motions simultaneously.

Lockwood and Stanton's argument that they signed the Guarantee on behalf of Meridian and not in their personal capacity is unavailing. The common law rule is that corporate officials may be held individually liable for their tortious conduct, even if undertaken while acting in their official capacity.[5] This rule applies to claims of fraud,[6] whether based on intentional or negligent misrepresentation.[7] Thus, as a matter of law, Lockwood and Stanton may be held liable for any fraud stemming from the execution of the Guarantee.

As to misrepresentation, Lockwood argues that this Court has no jurisdiction over claims of negligent mispresentation unless the claims are asserted under the Consumer Fraud Act. Otherwise, the Court of Chancery has exclusive jurisdiction over claims of negligent misrepresentation. Moreover, Lockwood argues that the Complaint makes no allegations if a false misrepresentation of material fact.

In order to state a claim for fraud or fraudulent inducement, a plaintiff must plead with particularity the following elements: (1) a false representation of material fact; (2)

---

[5] *Donsco, Inc. v. Casper Corp.*, 587 F.2d 602, 606 (3rd Cir. 1978)(holding that "a corporate officer is individually liable for the torts he personally commits and cannot shield himself behind a corporation when he an actual participant in the tort").

[6] *St. James Recreation, LLC v. Rieger Opportunity Partners, LLC*, 2003 WL 22659875, at *6 (Del. Ch.)(citing *Marino v. Cross Country bank*, 2003 WL 503257, at *7 (D.Del. 2003)). *See also* 3A William Meade Fletcher et al., Fletcher Cyclopedia of the Law of Private Corporations § 1143 (2002) ("A corporate officer or agent who commits fraud is personally liable to a person injured by the fraud. An officer actively participating in the fraud cannot escape personal liability on the ground that the officer was acting for the corporation."). 18B Am.Jur.2d *Corporations* § 1882 (2003) (same).

[7] *Id.* at *6.

the defendant's knowledge of or belief as to the falsity of the representation or the defendant's reckless indifference to the truth of the representation; (3) the defendant's intent to induce the plaintiff to act or refrain from acting; (4) the plaintiff's action or inaction taken in justifiable reliance upon the representation; and (5) damage to the plaintiff as a result of such reliance.[8] An action for fraud can occur not only where there is an overt misrepresentation but may exist where there is a deliberate concealment of material facts or silence when one ha a duty to speak.[9]

As to the allegation of fraud or fraudulent inducement, Lockwood and Stanton argue that the Complaint does not allege any false misrepresentation of material fact by Lockwood. The Complaint alleges that in the letter dated April 2, 2008, Meridian promised to pay Duffield's increased contract price. The Complaint also alleges that during this same time frame, Lockwood was engaged in discussions with Artesian for the sale of all of Meridian's assets, an event which would impair Meridian's ability to make good on its promise to pay. The Complaint alleges that Lockwood and Stanton never informed Duffield of imminent sale of Meridian's assets and that the sale took place in June 2008. The Court finds that these allegations meet the pleading requirements for fraud. It is conceivable that a finding could be made that the objective of the April 2nd letter was to induce Duffield to continue to work on the project while Lockwood and

---

[8] *Stephenson v. Capano Development Co.,* 462 A.2d 1069, 1073 (Del. 1983); *Chaplake Holdings, Ltd. v. Chrysler Corp.*, 1999 WL 167834 (Del. Super.).

[9] *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 149 (Del. 1987).

Stanton were well aware that payment from Meridian would be impossible if Meridian's assets were sold. Duffield did take such action in resuming its work under the Agreement and has suffered damage in not being paid in full, two material facts which are not in contention. Although Stanton argues that he did not benefit from the sale of Meridian's assets, a benefit to him is not one of the elements of fraud or fraudulent inducement. The elements of fraudulent inducement are also sufficiently pled. The motion to dismiss the counts of fraud and fraudulent inducement is denied.

As to the claim of misrepresentation, Lockwood and Stanton argue that Plaintiff alleges negligent misrepresentation. They argue that unless this claim is brought under the Consumer Fraud Act, exclusive jurisdiction over this cause of action lies with the Court of Chancery.[10] However, it is clear that Duffield alleges intentional misrepresentation. The following elements must be pled: (1) deliberate concealment by the defendant of a material past or present fact, or silence in the face of a duty to speak; (2) that defendant acted with scienter; (3) an intent to induce plaintiff's reliance upon the concealment; (4) causation; and (5) damages resulting from the concealment.[11] The Complaint makes these allegations. The material fact concealed was the negotiations with Artesian for the sale of Meridian's assets, and the Complaint alleges scienter, that is, that both Lockwood and Stanton knowingly withheld the information. The alleged

---

[10]*Id.* (citing *Ianono v. Barici*, 2006 WL 3844208 (Del. Super.)).

[11]*Nicolet, Inc. v. Nutt*, 525 A.2d 146, 149 (Del. 1987).

intention was to induce Duffield to resume work on the project. Duffield's reliance on the allegedly false promise in the April 2nd letter caused the damages in unpaid invoices.

As has been said, a "word, even a nod or a wink or a shake of the head or a smile or gesture" can constitute a fraud if the intent is to induce action by causing belief in a false fact or a non-existing fact. In this case, it is the April 2nd letter that allegedly constituted the fraud. The elements of fraud, fraudulent inducement and intentional misrepresentation are sufficiently pled to survive the motion to dismiss. As to civil conspiracy, Lockwood and Stanton argue that the Complaint does not plead an underlying wrong that would be actionable absent the conspiracy. To state a claim for civil conspiracy, a plaintiff must allege (1) a confederation or combination of two or more persons; (2) an unlawful act done in furtherance of the conspiracy; and (3) actual damage.[12] The Complaint alleges that Lockwood and Stanton intentionally misrepresented that payment would be made by Meridian and that Duffield was injured by completing work without being paid for it. Intentional misrepresentation is an independent tort that supports a complaint of civil conspiracy, and the Court has found that the Complaint adequately pled intentional misrepresentation.[13] The allegation is also made that Lockwood and Stanton made the misrepresentations in concert with one another in executing the Guarantee, and it is uncontested that Duffield had not been paid

[12] *Id.* at 149-50.

[13] *Id.* at 150.

in full, thus constituting damages. Under Delaware law, a conspirator is jointly and severally liable for the acts of co-conspirators committed in furtherance of a conspiracy.[14] The Court finds that the Complaint adequately pleads the elements of civil conspiracy, and the motion to dismiss is denied as to this allegation.

Having reviewed the motions to dismiss Count III filed by Darin Lockwood and John Stanton, it cannot be said that there is no set of facts which could be proved to support the claims of fraud, fraudulent inducement, intentional misrepresentation and civil conspiracy. Each of the claims is well pled. Defendants Lockwood's and Stanton's motions to dismiss are therefore **DENIED.**

Duffield's motion to dismiss Windmill's counterclaim. Windmill has counterclaimed for delays caused by Duffield which allegedly caused Windmill to be unable to complete settlement with a purchaser. Windmill seeks $3 million in lost profits due to Duffield's alleged breach of the April 2, 2008 letter agreement, as well as interest, attorney's fees and costs.[15]

Duffield argues that its contract for services was with Meridian, not Windmill, and that there is no privity of contract between Windmill and Duffield. Duffield further

---

[14] *Id.*

[15] Duffield argues that Windmill's counterclaim is unclear as to whether it sounds in contract or in tort. The language of the counterclaim makes no reference to tortious conduct. Instead, it refers to the "letter agreement" of April 2, 2008, and seeks damages for breach of same. Therefore, the counterclaim is a breach of contract claim, and the Court does not reach Duffield's argument that Windmill cannot recover in tort because of the economic loss doctrine.

argues that the Guarantee dated April 2, 2008, is a promise by Windmill to guarantee payment to Duffield on Duffield's contract with Meridian, thereby creating no direct obligation from Duffield to Windmill. Finally, Duffield argues that if the Guarantee created a contractual obligation from Duffield to Windmill, the scope of that obligation would be limited by the underlying contract between Duffield and Meridian.[16] Duffield points to Paragraph 14 of the General Contract Conditions, which provides as follows: "Client agrees to limit our liability to client or any third party arising from negligent professional acts, errors, or omissions such that our total aggregate liability shall not exceed $50,000 or our total fee, whichever is greater."

The elements for a breach of contract claim are: (1) the existence of a contract; (2) the breach of an obligation imposed by that contract; and (3) resulting damages.[17] At this early state of the proceedings, it is problematic to determine whether Windmill had contractual rights as a third party beneficiary under either contract at issue here. Moreover, on the question of damages, proof of Windmill's $3 million claim would require inquiry into documents outside the pleadings. Thus, it is necessary to have a more fully developed record to obtain resolution of these issues.[18] The motion to dismiss

---

[16]*See, e.g., Lewis v. Home Ins. Co.*, 314 A.2d 924, 926 (Del. Super. 1973)(third party beneficiary must accept contract as it was made, and his rights are subject to the equities and infirmities existing between original parties).

[17]*VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003).

[18]*Law Debenture Trust Co. of New York v. Petrohawk Energy Corp.*, 2007 WL 2248150 (Del. Ch.) (noting necessity of developing record for resolution of discrete issues on motion to

the counterclaim is therefore premature[19] and is denied.

Thus, the pending motions are resolved as follows. Darin Lockwood's motion to dismiss Count III of the Complaint is **DENIED.** John Stanton's motion to dismiss Count III of the Complaint is **DENIED.** Duffield's motion to dismiss Windmill's counterclaim is **DENIED.**

IT IS SO ORDERED.

Richard F. Stokes

Original to Prothonotary

dismiss); *TCW Tech. Ltd. P'ship v. Intermedia Communications, Inc.*, 2000 WL 165504 (Del. Ch.)(observing necessity for litigants to develop a record sufficient to draft pleadings with particularized allegations to survive motion to dismiss).

[19]*See Harman v. Masoneilan Internat'l, Inc.*, 442 A.2d 484, 502 (Del. 1982).